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ABSTRACT

In four sections, this newsletter issue presents: (1) a view of the problem of confidentiality and due process in relation to the Dinnan case; (2) a report of events occurring at colleges that are related to the Yeshiva University decision; (3) updates to June 1981 bibliographic citations concerning the Yeshiva University decision; and (4) a summary of events pertaining to strikes in higher education in the 1981-82 academic year. In "Confidentiality and Due Process," Aaron Levenstein discusses his disagreement with the positions of Professor James A. Dinnan, of the University of Georgia, who refused to reveal to a federal court how he voted on the reappointment of a colleague, who alleged she was a victim of sex discrimination. Areas of disagreement pertain to Dinnan's belief that if the Personnel and Budget Committees' behavior were public they could act differently, his failure to recognize social changes, and his view that confidentiality should protect the decision-maker. Levenstein asserts that secrecy of decision-making is incompatible with due process and violates good management. In "Yeshivawatch," events occurring at nine colleges that are related to the Yeshiva University decisions are identified. An updated version of "Bibliography No. 8-9 on Collective Bargaining in Higher Education," which pertains to the Yeshiva University decision, is presented in "Yeshiva Bibliography." In "1981 Strike Scene," only four strikes were identified for the fall 1981 semester. Of the four impasses classified as work stoppages, none could be directly attributed to the Yeshiva University decision, although one private institution, Wagner College, did strike in April, 1981 over a series of Yeshiva-related issues. (SW)

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NEWSLETTER

CONFIDENTIALITY AND DUE PROCESS, "YESHIVAWATCH," NLRB V. YESHIVA UNIVERSITY: AN UPDATED BIBLIOGRAPHY, 1981 STRIKE SCENE

Volume 9, No. 4 Sept.-Oct 1981

National Center for the Study of Collective Bargaining
in Higher Education and the Professions
Baruch College, City University of New York

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NEWSLETTER
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CONFIDENTIALITY AND DUE PROCESS

By Aaron Levenstein

The basic issue in the Dinnan case is the role of secrecy and confidentiality in the university. Some of us believe that governance in the university is not so fragile a blossom that it will wither under the gaze of public observation. The issue is both a moral and legal one; Judge Oliver Wendell Holmes used to say that it was inadvisable to combine moral issues with legal issues because you then get confused on both scores. That's not my view. I think we have to discuss them together . . . .

We are dealing with an intricate issue of the moral law and the legal structure within which we operate. There is plenty of room for debate. Dr. Dinnan has done us all a great service by dramatizing the issue and forcing all of us to face up to it. It has been said that nothing so concentrates your thinking as knowing that you are going to be hanged. Unquestionably, when the instruments of the courts are used as they have been abused in Dr. Dinnan's case, we have reached the point where the time is ripe for us to clarify exactly what we believe in this area.

First, let me make clear that I speak only for myself and take sole responsibility for whatever heresies I am about to pronounce. These views are not those of any organization of which I am a member – not the National Center with which I have the honor to be associated, nor the Professional Staff Congress, nor the University Centers for Rational Alternatives, which incidentally has been very supportive of Dr. Dinnan's position, nor the view of the International Council on the Future of the University, nor any of the other groups to which I belong.

The Attitude of the Court

The reality, as I see it, is that we must confront the question within the framework of our contemporary culture. We must examine the extent to which society's new moral values, reflected in the legal positions that have been adopted in relation to issues of discrimination, have altered our traditional practices. Are we willing to face up to the new trends in our culture which, in my judgment, represent a higher level of concern?

Let me make it specific: no words can be too harsh or condemnatory for Judge Owens who fined and jailed Dr. Dinnan. Dr. Dinnan was testing an important legal question. Throughout the history of our legal institutions, society has respected the concept of the test case. The only way we can bring issues of this kind to the courts is for somebody to commit what is deemed to be a breach. Only a judge who was hostile – I think not only to the respondent in this case, but to the whole academic community – could have taken such vindictive action against the person of our colleague.

But that does not mean that we must necessarily agree with the logic that underlies his position.

Although I disagree with Dr. Dinnan, I want to emphasize that I admire his willingness to pay the price for his convictions. But as someone pointed out – I think it was Bernard Shaw – martyrdom is merely proof of a person's sincerity and not proof of the validity of his position. Socrates was willing to drink the hemlock – but that doesn't necessarily prove that his philosophical views are sound. St Stephen was ready to bare his bosom to the stones and give his life for what he believed – but that doesn't prove the metaphysics of St. Paul. Rabbi Akiva permitted himself to be flayed by the Romans – but that doesn't establish the superiority of Jehovah over the pantheon of the Gods worshipped by the Caesars. The test of truth is impersonal. I hope that Dr. Dinnan, whose person I respect, will accept my statement of personal regard for him. After all, look at the company in which I've put him – Socrates, St. Stephen and Rabbi Akiva.

(Editor's Note. The jailing of Professor James A. Dinnan, of the University of Georgia, for refusing to reveal to a federal court how he voted on the reappointment of a colleague, is still pending on appeal. At issue in the court case was the allegation of a faculty member that she was a victim of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964. See "Academic Judgment in the Courts," National Center *Newsletter,* Sept.-Oct. 1980, Vol 8, No. 3, pp. 1-3. At the last annual conference of the National Center, the issue was debated by Professors Dinnan and Aaron Levenstein of Baruch College. Following is a condensed version of professor Levenstein's remarks which present an alternative view of the problem of confidentiality and due process. The complete papers of both Professors Dinnan and Levenstein will appear in the *Proceedings* of the Ninth Annual Conference. As of this date, the case is still on appeal before the newly formed 11th Circuit Court of Appeals. Further discussion is invited from readers of the Newsletter).

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Four Issues

I have four reasons for disagreeing with Dr. Dinnan:

1. His position is based on the assumption that faculty members are lacking in moral character; if their behavior in Personnel and Budget Committees were public, they would act differently.

2. His position is based on bad sociology. It fails to recognize the social changes that have occurred in our society.

3. It is based on bad law.

4. His position flies in the face of what I consider to be sound management philosophy. As some of you may have heard, the Supreme Court says that college professors are managers. Of course, we have been called worse names than that. We were accustomed once to think of ourselves as priests at the altars of learning, but now we are told that we are managers at the counters of commerce. Not by the National Labor Relations Board. It is the Supreme Court that has imposed this industrial model on us. In any case, say it's bad management to have decisions made *in camera*, a method that may once have had merit but is incompatible with contemporary practice.

The Purpose of Confidentiality

Let me turn to the moral issue. We are told that secrecy is necessary because faculty committees and administrators who are engaged in making personnel decisions lack the character to make sound decisions in the glare of publicity. I believe it is the other way round: if they lack character so that they cannot make decisions on the merits when they are observed, then indeed it is essential that they be observed when they are making the decisions.

What was the origin of confidentiality? Whom was it supposed to protect? Those who sit in judgment or those who were being judged?

Take everyone of the legal relationships in which confidentiality is safeguarded – doctor and patient, priest and parishioner, lawyer and client, journalist and his source, although that's a qualified privilege. Who is being protected by the confidentiality? For example, are we protecting the doctor? No. The purpose of the confidentiality is to protect the patient who has the legal right to waive it. In the case of lawyer and client, heaven knows the lawyers do need the protection but the purpose is to protect the client, and again the client has the right to waive. In the case of the journalist and source – who is being protected? We have just come through the scandal of the Washington Post and the Pulitzer Prize. Who is being protected? Not the journalist. If the source is willing to be identified, the safeguard ceases to exist.

There was good reason for confidentiality in the making of decisions about faculty: to protect the individual faculty member. That was the principal reason. But if the purpose of confidentiality in the academic community is to protect those who are making the decisions, there is no precedent whatsoever in law. Even juries must reveal how they voted.

The Quality of Academic Decisions

I see no reason to give a special privilege to the academic community. When one looks at the quality of the decisions made in secret, what do we find? People who are turned down in one institution because their scholarly qualities are deemed to be inadequate move to another institution where they achieve renown. As a data-oriented community, we in the academy should examine our own studies.

Jerry Bergman in his study of "Peer Evaluation of University Faculty," which does not address the issue of confidentiality or secrecy in the making of decisions or the procedures of self governance, confines himself to the merit of the resulting actions. He writes: "Tenure has been essentially a popularity vote and has been linked by many administrators to the elite yacht clubs which have excluded Jews, women and, of course, blacks and other minority groups for decades. Achieving tenure was largely being elected to the club which is largely based on one's sex, race, religion, beliefs and in short, whether or not the club members can get along with the neophyte. *Therefore, it can safely be said that tenure is or, at least often usually is based on illegal criteria.*" (Emphasis in the original.) But he is optimistic. "This though will likely in the future change. And why? It seems that employee lawsuits will perfect a change in the process of obtaining tenure and promotion."

If this happens in only a fraction of the cases we need this glare of publicity on the process. We cannot tolerate a cloak of secrecy around the making of academic judgments. Society has said we have a special concern with the elimination of discrimination based on ethnic origin or sex. The only remedy is public exposure, open grievance procedures and judicial intervention.

I have no opinion on the issues of fact involved in the court case that resulted in Dr. Dinnan's citation for contempt. But I do know that if I wanted to discriminate against women and blacks, the best method would be star-chamber proceedings under which nobody is allowed to talk about what led to the decision of the committee. I have sat on such committees. I have heard discussions of candidates in which questions have been raised about candidates for appointment. Does Mrs. So-and-So have a child? Won't she miss classes when the youngster is sick? If she does come in on such occasions, won't her mind be elsewhere than on the work in the classroom? What does her husband do? If he's an executive, is he likely to be moved to a new location, so that she would have to leave? Of course, such questions are forbidden by law but I've heard these things discussed.

Now if an act is forbidden by law, should not the Judiciary have a right to inquire into whether it has been violated? The courts, not only have the right but the duty to inquire into whether the law is being violated.

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New Atmosphere

We are now living in a period in which important social changes have occurred. The economic plight of higher education requires we rethink old methods. In the past the consequences of a bad, even a prejudiced, decision were not so serious but what society could afford to pay the price for it. In those days if a faculty member were turned down, for whatever reason, he or she could move on to another campus. There was another job waiting. Today a refusal to reappoint may mean the end of a career. The truth is that conditions have changed so substantially that the genteel tradition of collegiality has fallen before the employment statistics in higher education today.

Moreover, in a society that enacted Sunshine Laws and Freedom of Information Act, do you think it is still tenable to maintain the kind of secrecy that operates where the career of an academic is on the line? I can see what the FBI files say about me, but I cannot see what the administrative file of my college says about me at the present time. I can look at the files of the CIA, within limits, but not at the minutes of a P&B Committee of my college. A president of the United States can be forced to surrender the tapes that recorded his conversations with intimate advisors in the Oval Office, but a professor cannot penetrate the conversations that took place in a smoke-filled committee room on the campus.

If a janitor is fired from his job in your college, his union will see to it that there be a complete and open revelation of the reasons that led to that discharge. But not so in the case of the college professor. It is sociologically untenable that college professors should have fewer rights in society. Dr. Dinnan may be right that we are in danger of losing many of our rights. Encroachments are occurring. That happened when the Supreme Court of the United States said that though a janitor on the college campus may have a union, the professor on the college campus is not to have the protection of the National Labor Relations Act. Yes, there is danger but the dangers are much more complex than the issue of confidentiality, and they come from many directions.

Due Process

Secrecy of decision-making is incompatible with due process. It violates the right of confrontation. During the McCarthy era, President Eisenhower made this statement: "I was born and raised in Abilene, Kansas. That town had a code and I was raised as a boy to prize that code. It was meet anyone face to face with whom you disagree. You could not sneak up on him from behind, do any damage to him without suffering the penalty of an outraged citizen. In this country, if someone dislikes you or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind without suffering the penalties which an outraged citizenry will inflict. If we are going to be proud that we are Americans, there must be no weakening of the codes by which we have lived." It is time that the ethic of Abilene is accepted in the groves of academe.

The Supreme Court has said that due process for persons charged with crime includes "reasonable notice of the charges against him, an opportunity to be heard in his own defense and the right to confront and cross examine witnesses against him." But you and I know what happens in our institutions that are dedicated to knowledge and the pursuit of truth. When a professor of philosophy comes up for consideration, does he have a right to know that he was rejected because his colleagues are positivists and he is an existentialist, or vice versa? Does the economist who's turned down have a right to know that he's being kicked out because his colleagues are Galbraithians and he's a Friedmanite, or vice versa? In a Psychology Department, are we not to know whether somebody is being turned out because he's a Freudian and the others are Behavior-Modification advocates. This fragile flower of our academic community will disintegrate if we dare not tell each other on what grounds we base our decisions.

Accountability

The secrecy principle violates good management. How are you going to hold those who make personnel decisions accountable unless there is knowledge of what they said and did in making their decisions?

We know that our evaluations are not objective but impressionistic. We have not yet been able to define what it is that makes the great scholar. Nor, the criteria which indicate what the great teacher is like. Joseph Epstein's collection of articles on great teachers that appeared in the *American Scholar* prove the point. All of the reviewers who dealt with the book agree that none of the writers on any of these teachers really tell why they were outstanding. The truth is that we dare not claim our yardsticks are so objective that they do not require scrutiny by any other source.

I think I know my colleagues. With all their faults, which I know I share with them, I admire them for their achievements and their integrity. But I'm old enough to know that when I am most biased, I am least likely to recognize the fact that I am prejudiced. Such is the very nature of prejudice. There's always a rationalization that can serve as the groom who buckles us in the armor of reason, so-called, and then drapes the armor with the silks of dedication to the noble cause. Is there anybody among us here who can deny that the academy has been guilty of discrimination like the rest of our society? But let me say this too in closing. Precisely because I'm among those who oppose the use of quotas to remedy what has happened, because I consider that remedy as abhorrent as the disease itself, I want to be sure that we have available to us a system, a procedure that prevents discrimination from controlling decisions in the individual cases. And that's why I argue that personnel decisions in higher education must be just as open and subject to review as similar decisions in the rest of society.

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"YESHIVAWATCH"

As part of its ongoing research mission, the National Center has been monitoring and reporting events related to the decision of the United States Supreme Court in *NLRB v. Yeshiva University.* Beginning with Volume 9, No. 3, we began to itemize each event and we continue with Items 3-11 in this issue. (For a complete analysis of the *Yeshiva* decision, see Volume 8, No. 1.)

Item No. 3: Yeshiva has spread north of the border where a great deal of attention is now centered on a dispute at *Mount Allison University,* New Brunswick, Canada. The Industrial Relations Board of New Brunswick had decided that a majority of the faculty favored certification. However, the University asked for and received permission to argue that under the terms of the Industrial Relations Act, faculty were not employees because they "exercise management functions." The issue is in litigation at this point as both parties have adopted predictable *Yeshiva*-like positions. Until the question of certification is finalized, no collective bargaining will occur. Subsequently, the administration, with the approval of the union, has granted the faculty a raise of 12.5 percent.

Item No. 4: Curry College, which had reportedly refused to negotiate a new agreement, has recently concluded negotiations for a successor Agreement with the faculty at that Massachusetts College. As part of the settlement, the local AAUP agreed to drop all *Yeshiva*-related litigation.

Item No. 5: Catholic University Law School – United States Court of Appeals for the District of Columbia recently ruled that the Law School faculty at CU are not entitled to bargain under the protection of the National Labor Relations Act and, thus in essence, the faculty have been "Yeshivaized." The original certification has been withdrawn and an Appeal filed by the faculty has also been dismissed.

Item No. 6: Mount Vernon College – The local AAUP Chapter has voluntarily resigned its certification at Mount Vernon College in exchange for an agreement with the administration. The new two-year "contract" is based upon a previously executed Memorandum of Understanding and forms the basis of a new employment relationship.

Item No. 7: Loretto Heights – The administration at Loretto Heights originally broke off negotiations for a successor CBA with the local NEA affiliate claiming *Yeshiva.* The regional office of the NLRB sustained their position, however, an NLRB administrative law judge subsequently ruled that the faculty cannot be "Yeshivaized", and thus the college was committing an unfair labor practice by refusing to bargain. The administration has since appealed this decision and the case is currently before the full board.

Item No. 8: Boston University – Hearings are continuing before the regional NLRB in Boston over the applicability of *Yeshiva* to B.U. Additionally, the issue of department chairperson inclusion in the unit has been challenged. As of this writing, approximately 10,000 pages of testimony have been taken with over 20,000 pages of documents being admitted as evidence. The case is expected to last for the entire 1981-82 academic year with no date yet being projected for the expected ruling. In the interim, the parties are conducting negotiations for a successor collective bargaining agreement. Since the appointment of two new NLRB members, the University has filed a motion for reconsideration on certain procedural rulings by the Administrative Law Judge in the case. No rulings on this motion has been received as of this writing.

Item No. 9: Stephens College (Missouri) – The NLRB General Counsel has reversed the decision of the regional director who held that the faculty at Stephens were managerial and exempt from coverage under the NLRA. A complaint has been issued against the college, and it appears that a full hearing will now be scheduled on the applicability of the *Yeshiva* doctrine to Stephens.

Item No. 10: Ohio Northern – The NLRB General Counsel has sustained an appeal by ONUFA and OEA challenging the decision of the regional director which held the entire faculty at ONU were managerial and that the original certification was improper. The General Counsel remanded the case back to the regional director with an order to issue a complaint against the University. In the interim, the union has requested the University to enter into negotiations for a successor agreement contending that the original collective bargaining agreement, due to expire in the fall of '82, is still in effect. A hearing on the unfair labor practice against the University is scheduled for some time in January.

Item No. 11: Milton College – This small Wisconsin College (30-35 faculty members and 450 students) is the latest to exercise a *Yeshiva*-like claim. In 1979, the Milton College Faculty Association/Wisconsin Federation of Teachers/AFT won representation rights. The administration subsequently refused to bargain an initial Agreement claiming an exemption from bargaining based on *Yeshiva.* The College reportedly never argued the "managerial issue" during the certification and representation stages and the union now claims that they, in essence, have waived their rights to do so now.

In order to expedite the process, both parties, with the concurrence of the regional NLRB, agreed to seek a motion for summary judgment from the NLRB in Washington.

Item No. 12: St. Joseph's College – The issue of NLRA coverage for faculty at religious institutions was unsuccessfully raised by the administration of St. Joseph's College in their attempt not to engage in collective bargaining with the Faculty Association. (See *NLRB v. Catholic Bishops.)* Their claim was rejected by the regional NLRB who subsequently issued an order for a representation election to be held sometime this fall. The college appealed and the NLRB in Washington has taken the review. The election order has been stayed pending their findings. The college is claiming that the faculty have a very limited say in the running of the college and that, in reality, the Sisters of Mercy run the institution, thus *Yeshiva* is not applicable.

NLRB v. YESHIVA UNIVERSITY: AN UPDATED BIBLIOGRAPHY

Academic collective bargaining has never suffered from a shortage of scholars who have devoted their research efforts to describing this somewhat unique phenomenon. Indeed, the National Center's *Bibliography No. 8-9 on Collective Bargaining in Higher Education,* can clearly attest to that. Of all the topics described in the Bibliography, none has grown in volume as rapidly as those related to the *Yeshiva University* decision.

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1981 STRIKE SCENE

The number of reported work stoppages in higher education at the beginning of the 1981-82 academic year was significantly lower than forecasters initially predicted. Only four strikes were identified, the lowest amount reported for any fall semester opening in the last five years. Of the four impasses we classified as work stoppages, none could be directly attributed to the *Yeshiva* decision although, one private institution. Wagner College, did strike in April, 1981 over a series of *Yeshiva*-related issues. It is significant to note that while the number of strikes has declined, the total of recognized bargaining agents and negotiated contracts has steadily increased since NCSCBHEP originally started to tabulate this data some ten years ago.

A summary of each strike identified in Table I is reported below:

TABLE I

SUMMARY OF STRIKES FALL 1981

Institution	State	Number In Bargaining Unit	Bargaining Agent
Delaware County Community College	Pennsylvania	100	NEA
Dowling College	New York	71	NYSUT/AFT
Montgomery County Community College	Pennsylvania	150	AAUP
University of Dubuque	Iowa	46 F/PT	NEA

Source: NCSCBHEP Research

A. Montgomery County Community College – This impasse occurred over a dispute concerning a wage reopener and resulted in a twenty-three day strike. The college had established a deadline of September 28th for completion of a negotiated settlement, after which if no settlement had occurred, they would close the college for the duration of the fall semester. A settlement was reached on September 28th providing for a 9.9 percent wage increase.

B. The impasse at Delaware County Community College was not technically considered a strike by the administration, as no walkout or picketing was reported. Once again, a wage reopener was at the height of the impasse, however, the administration delayed the start of the fall semester, which was scheduled to begin August 31, 1981, until September 25, 1981, a day after a settlement was reached. The new salary schedule provides for increases from 10 to 14 percent. The administration claimed that it was put in the unusual position of not condoning a faculty walkout inasmuch as Pennsylvania state law requires a college semester to be a full fifteen weeks, and thus, the school might be liable to reimburse students for lost time. If that was so, the administration might have to claim bankruptcy. The union contested this approach, however, the issue is now moot in light of the settlement.

C. The strike at Dowling College lasted fourteen days and resulted in an increase of approximately 9½ percent a year in each of two years. As in Montgomery County and Delaware County, the only reported contract changes were economic ones with the rest of the language left intact.

D. Economics and job security were the strike issues at Dubuque College of the University of Dubuque. This was the second strike in two years at the University as faculty at the Dubuque Seminary walked off the job last fall. The new agreement provides for three years of salary increases at 9½% for year one and an additional 7½% in each of the next two years. The University sought and received limited flexibility to award greater salary increases to faculty in more competitive fields (i.e. computer sciences). Additionally an evaluation system for tenured faculty was also negotiated.

TABLE II

STRIKE SUMMARY
FALL SEMESTER 1977-1981

Fall Semester	Number of Strikes
1977	6
1978	12
1979	11
1980	8
1981	4

Source: NCSCBHEP Research

Table II summarizes the number of strikes during the past five fall semesters. While prognostication is often a dangerous profession, several observations can be made:

1) The number of reported fall "back-to-school" strikes has declined for the fourth straight year.

2) The four strikes involved small to medium sized faculty bargaining units as opposed to any large statewide systems.

3) Both Montgomery and Delaware County Community Colleges appear to have claimed financial hardship and concomitantly the possibility of mandated tuition refunds if the strikes continued. No data is available as to how the unions reacted to these claims.

4) The number of multi-year agreements continues to increase as the parties are seeking an increased degree of labor relations stability.

No summary of the fall 1981 strike scene would be complete without a mention of the impact of the PATCO (Professional Air Traffic Controllers Organization) strike on the collective bargaining scene. Numerous calls were received by the Center during the month of September, by both representatives of labor and management, inquiring into the legality of assuming a PATCO-type stance in academic collective bargaining. While we know of no institution that has adopted this approach in their negotiations, the very presence of the question is somewhat indicative of a new approach, and perhaps, a changing labor relations climate.

In sum, the fall 1981-1982 academic semester saw relatively few strikes that can either be interpreted as a maturing of the employment relationships between the parties or as a perceived reaction against strikes by professionals in the wake of PATCO.